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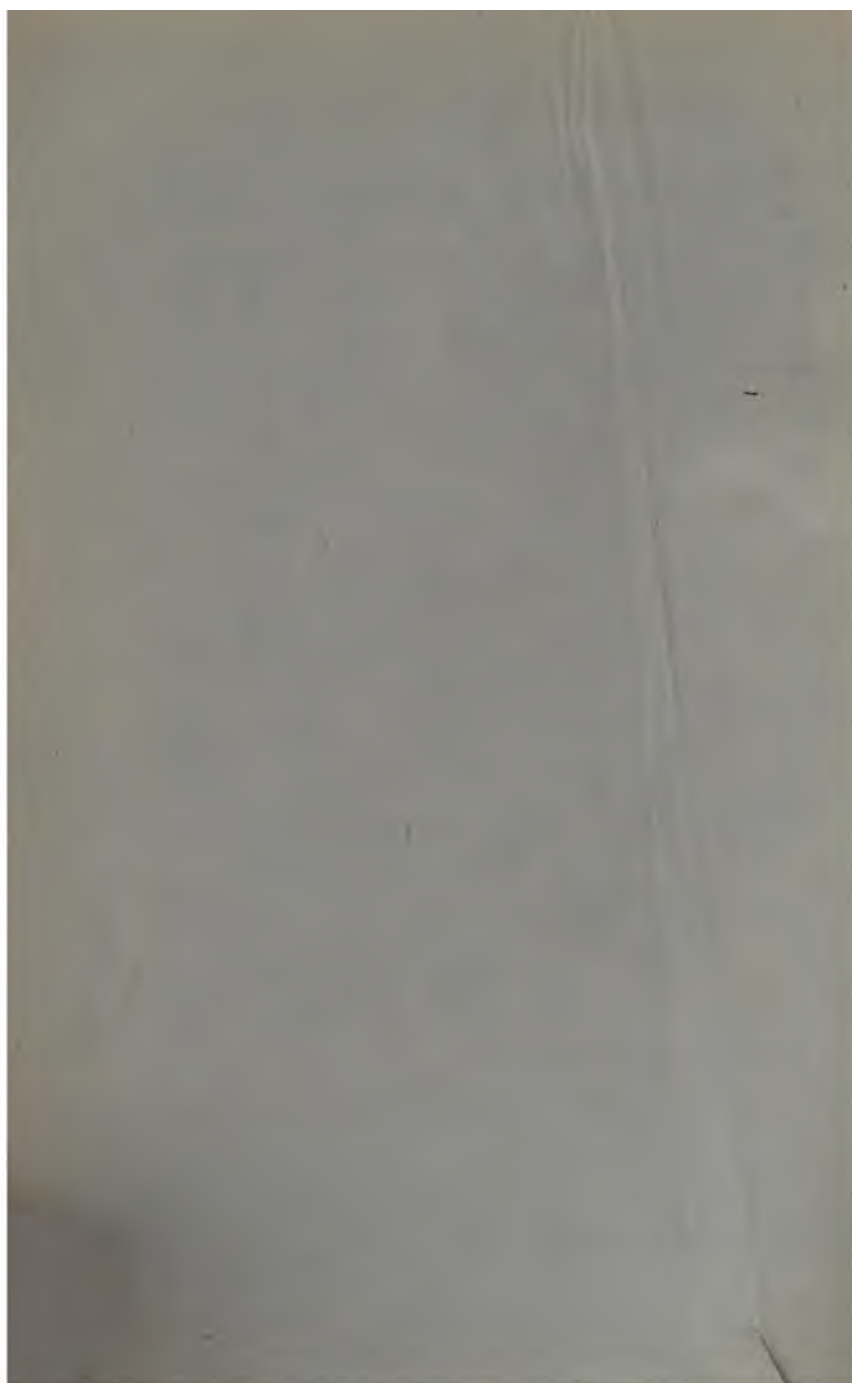
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QUESTIONS OF THE DAY.—NO. XLI.

THE
FISHERY QUESTION

ITS ORIGIN, HISTORY AND PRESENT
SITUATION

WITH A MAP OF THE ANGLO-AMERICAN FISHING
GROUNDS AND A SHORT BIBLIOGRAPHY

BY

CHARLES ISHAM

APR 10 1887

NEW YORK & LONDON
G. P. PUTNAM'S SONS

The Knickerbocker Press

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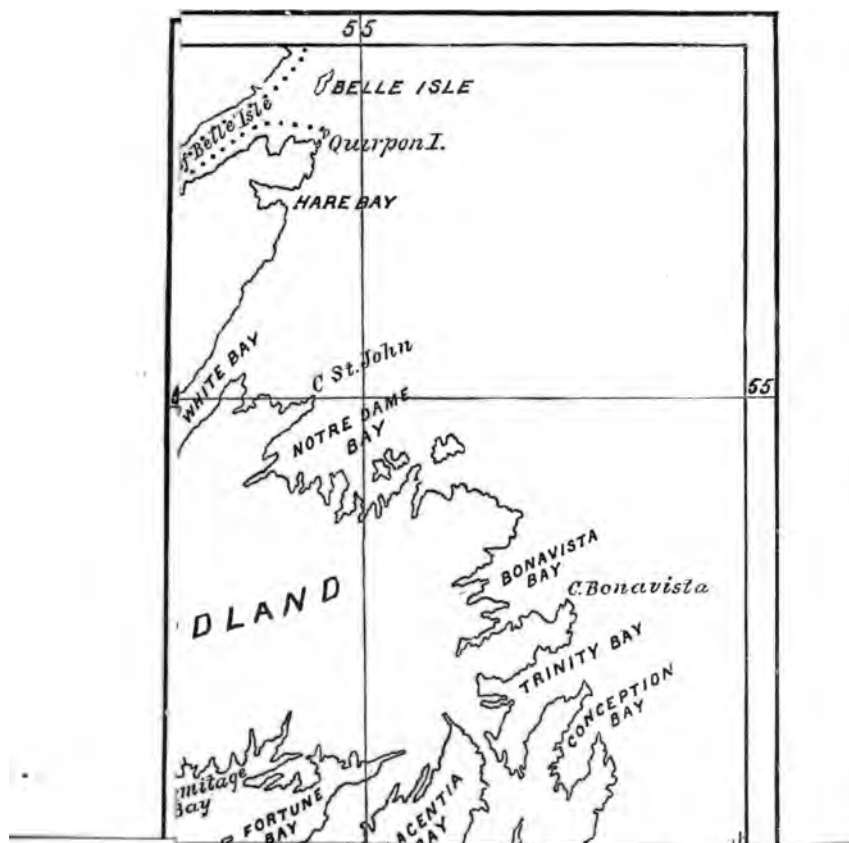
PREFACE.

THE greater part of this work was done for the United States History Seminar, Graduate Department, of Harvard University. The numbers in the text refer to the bibliography.

C. I.

May 14, 1887.





THE FISHERY QUESTION.

IT is probable that fishermen from Brittany visited the banks of Newfoundland before Columbus discovered the Antilles.¹ Personal interests and the commercial enterprise of Dieppe and St. Malo were represented by these voyages, rather than the Government of France; for neither the fishermen nor their employers had much communication with the French Court. They took upon themselves the defence of their trade, and even the punishment of their enemies.² By formal discovery England might have asserted a monopoly in the Newfoundland Fishery, through the voyage of John Cabot in 1497. Such pretensions, however, would have been most dangerous in the presence of the far more powerful navies of Spain and Portugal. A protest against possible interference was lodged by the Spanish ambassador at the English Court, but Spain soon became absorbed in her rich colonies around the Gulf of

Mexico and in South America.³ Her fishermen gradually left the banks during the seventeenth century.⁴ Spanish claims were revived as late as 1783, but only in the faint hope of bartering them with England for the surrender of Gibraltar.⁵

Gaspar Cortereal sailed from Portugal in 1501. Upon his return fishing companies were formed, and three years later the industry was strong enough to pay a tax of ten per cent. on profits into the custom-houses of Emanuel II.⁶

The conquest of Portugal by Spain did not immediately end the participation of the former in the Fishery. Portuguese vessels were still numerous in 1583. Then the numbers rapidly declined.⁷ In 1517 the French flag is supposed to have had the largest representation in Newfoundland waters. Verrazano, by virtue of whose explorations France claimed a title in the New World, sailed under a French commission in 1523, perhaps to cruise against the Spaniards. Just what he accomplished, the following year, is very difficult to determine. He may have touched at Newfoundland before his return to port.⁸ France, now consolidated under François I., was at last

in a position to profit by the skill of the Britons in navigation. Chabot, admiral of France, influenced no doubt by the spectacle of the Spanish colonies, dispatched Cartier in 1534 to obtain more definite information. Cartier sailed to Newfoundland, and in the execution of his instructions explored the Gulf of Saint Lawrence. The King's ambition was to be a power in Europe. He was rather disposed to ridicule western colonization, and almost in jest, he granted the unknown country to a favorite. Again Cartier sailed in 1540, as commander-general under Robeval, to whom François had given a feudal seigniory, comprehensive enough to include all of North America. Both passed the winter in Canada and both returned,⁹ Robeval to engage in the European wars. His attempt to found a colony was not successful, and he perished after again setting out for America in 1549. Under the influence of Sully, Henry IV. placed the Fishery under government protection and gave to De la Roche the lieutenancy in New France.

Interested parties may have caused these letters patent to be revoked. The patentee, with two hundred criminals, the material for

his colony, did not sail until 1598.¹⁰ Leaving forty of these miserable men on the uninhabitable Sable Island, the scene of the first attempt at French colonization, eighty years before, he continued his course to the continent.¹¹ De la Roche also returned without his company, and soon afterward died. A rescuing party was humanely undertaken by the Government, and a few of the colonists were found and brought alive to France.

A commission given by Henry to Chauvin indicates the part played by the French merchants in effecting a successful settlement in Canada. It contained an exclusive privilege for trading in furs.¹² The peltry obtained from Tadousac in 1600 and 1601 led to the formation of a company composed of Dieppe and Malonese merchants. Whatever trading rights then existed, seem to have been covered by Henry's patent to De Monts, who in 1603 assumed the viceroyalty in "La Cadia" with a monopoly of the fur trade from Cap de Raze, Newfoundland, to fifty degrees north latitude. The next year De Monts set out and vigorously raided the interloping fur traders. To Potrin-court, one of his companions, he gave the site of the modern Annap-

olis.¹³ When De Monts lost his patent in 1606, through the hostility of Malonese rivals, Potrin-court succeeded in obtaining a confirmation of his grant and founded Port Royal.

Englishmen already in Virginia claimed under their charter to the forty-fifth degree north latitude,¹⁴ but the French were unwilling to relinquish their occupations within the debatable territory. The Virginians, having decided to enforce their rights, as they understood them, fitted out, in time of peace, an expedition under Argall and destroyed Port Royal in 1613.¹⁵

That the French now possessed a centre of influence and of resistance, was due to the sagacity of Champlain ; convinced of the commercial and strategical superiority of the Saint Lawrence over the coast line, he had founded Quebec in 1608, when, as pilot, he accompanied De Monts to Tadousac, the latter having obtained the renewal of his patent for one year.

English commerce, heretofore confined to the Channel and the German Ocean, utilized promptly the discovery of Newfoundland,¹⁶ especially as the Dutch were then deriving

great profit from the sale of their herring to neighbors whose calendar contained so many fast days.¹⁷

Elliot and Ashenhurst, merchants of Bristol, received letters patent for colonizing Newfoundland from Henry VII. in 1502. There seems to be no further information in regard to their venture. The Fishery was free, by act of Edward VI., and thither as many as pleased could resort. Henry VIII. aided Thorne, of Bristol, in an attempt to discover the North-west passage. One of the vessels sailing in 1527 coasted Newfoundland, Cape Breton and Nova Scotia. Hoare attempted a colony on the island in 1536. His company, after many distresses, seized a French ship, in Newfoundland waters, and sailed for home. The English Government made restitution for their lawlessness. Every spring English fishermen sailed for the banks, returning late in the autumn with the catch dried and cured on the island. The profits were already so manifest, that a monopoly was eagerly desired. Merchants had begun to quarrel among themselves for the advantage of convenient shore stations. Soon after the accession of Elizabeth to the

throne, a restless, but by no means purposeless, energy inspired her seafaring subjects.¹⁸ French adventurers had demonstrated the inability of the Spanish navy to convey the treasure galleons from the West Indies. Merchants, explorers and pirates put to sea and English slave dealers forced the Spaniards to relax their exclusive trade regulations.¹⁹

Formal intimation of a design to acquire North America appeared in Gilbert's petition to Elizabeth making mention of the lands, "fatally reserved for England."²⁰

In 1578 Gilbert had secured letters patent to discover, settle and regulate these remote countries. Previous to his departure the Government found it expedient to send Sir Thomas Hampshire to the Newfoundland fishing grounds, for the purpose of settling disputes over the pre-emption of shore stations. Gilbert followed in 1583, but the Spanish war ships forced him to return.²¹ Trying again, the following year he made the harbor of St. Johns where were congregated fishing vessels of several nations. The hostility aroused by his appearance, at a time when any strange sail might well be a pirate,

abated when he announced his purpose and displayed his authority.

He was conducted on shore by the English captains, read his commission in the presence of a polyglot assembly, and took ceremonial possession of the island and all surrounding lands within a circumference of two hundred leagues.

No attempt was made to prevent a free fishery except that before his departure a tribute was levied on foreigners in acknowledgment of the Queen's rights.²²

A report that Frobisher had discovered gold mines in America stimulated the exertions of the English. There were many dangers to face besides those of the sea. Drake was cruising against the Spaniards. There were murderous quarrels among the fishermen and the line was beginning to be drawn between the French and the English. The detention of Clark and the pillage of his ship by Frenchmen immediately led to the arming of English crews. Soon afterwards, Lee and Heywick made a prize of one of the hostile French vessels and brought it back with them in 1597. Guy's treatise on Newfoundland, the result of a two years' residence, induced

the formation of the Northampton Company in 1610. Lord Bacon, one of the associates, was willing to leave gold hunting to others, but appreciated the Fisheries "like which, of all minerals, there is none so rich." James I., by the terms of this patent, conveyed all Newfoundland from the forty-sixth to the fifty-second degree north latitude, with all seas and islands within ten leagues of the coast, but reserved to persons of all nations the right of fishing, except between capes St. Mary and Bona Vista, where the company attempted to enforce a monopoly.

Complaints were loud against the patentees. Whitburne, engaged since 1591 in the fishery, was sent to Newfoundland to hear the evidence of one hundred and seventy English ship-masters, who claimed that the company taxed their cargoes, exacted fees and prevented them from obtaining bait. On his arrival he held a Court of Admiralty, but without restoring tranquillity, for in 1618 the merchants of Devon sent a petition to the Privy Council, in which old grievances were recited and the insecurity of the seas, by reason of piracies, was rehearsed.²³ The Northampton Company set up a denial of the

charges. They admitted the existence of piracy and offered to assist the merchants in suppressing it, but these overtures were rejected. The company then asked the government to make Newfoundland a naval station. The request was accompanied by a list of persons regarded as pirates, an estimate of damages amounting to £48,000 sterling, and a statement that one thousand and eighty fishermen had been kidnapped.

In spite of this state of society, the Fishery was profitable and on that account attractive. At the beginning of the seventeenth century the English opinion, often expressed, was decidedly that the best fishing ground existed off the New England coasts.²⁴

Bartholomew Gosnold, sailing in a small vessel with a few fishermen, reached Massachusetts Bay in 1602 and proceeded thence to a great headland, which he named Cape Cod on account of "the fish that pestered the ships." Pring, Waymouth Joselyn and the celebrated Captain John Smith, by reiterating this description arrested the attention of the public.

The capital necessary for ventures was supplied, in great measure, by merchants of

Dorchester and London. Fishing could only be carried on in the season. "Spare hands," left on shore and furnished with a winter's outfit, were the first New England colonists. Such was the beginning of the settlement of Cape Ann in 1623. Quiet prosecution of the Fishery was, moreover, favored by the peace recently concluded between James I. and the King of Spain. By charter, dated 1606, the Atlantic coast was parcelled out for the benefit of the London and the Plymouth Trading companies, the latter to utilize the territory between Delaware Bay and Port Royal. This instrument was subsequently modified.²⁵ It was through the exertions of Gorges that the Plymouth Company obtained a renewal of the original concessions. When James asked the spokesmen of the Pilgrims what profit might arise from their purpose to settle on these coasts, they replied in a single word, "fishing."

Fishing supplies were carefully furnished the emigrants who settled Salem. Fish were presently exported from Massachusetts to Spain, England, the West Indies and even to Holland. A trade commenced with the southern colonies. Winthrop, in 1641, esti-

mates the number of dry fish sent to market at three hundred thousand.²⁶ Saco, Richmond's Island, the vicinity of the Kennebec and the Penobscot were soon famous as advantageous fishing grounds. Without knowledge of the geography of the country the French and English governments granted patents freely in the wilds of North America. Everywhere the boundaries were indefinite, the titles in question and monopolies of the Fisheries assumed, if not expressly mentioned. Companies and merchants urged their respective governments to reprisals. Charles I. at the beginning of his reign recognized the importance of the Newfoundland Fishery, beside making some provision for the better government of the island. This action, however, was more than neutralized, in the opinion of his subjects, by the remission to the French of the former tribute on their catch. There were grave fears for the fishery fleet in 1625. Turkish pirates were blockading the western ports of England. From Newfoundland also came letters of Lord Baltimore, describing the depredations of the French, his own retaliation, and a request for men-of-war to protect the industry.

The vitality of the Massachusetts towns added to these complications, while they hastened the ultimate triumph of the mother country. Peters, a clergyman of Salem, urged the settlers to develop and extend their fisheries. Winthrop wrote of them, leased those within the patent of his company, and with other prominent colonists obtained inspectors of the annual catch.

The action of the Stuarts, when by the treaty of St. Germain-en-Lay, they ignored the wishes of the colonists and abandoned their patentee, Alexander, together with their claims to Canada, Acadia and Cape Breton, exasperated the opposition party in Old and New England.²⁷ The Newfoundland trade was further irritated by the remission to the French of the tribute, their establishments at Placentia, and the use they were permitted to make of the south coast, where the cod arrived earlier than at St. Johns. Boston listened with approbation to the denunciations of the Court by Bellemont, who traced the sinister influence of the French King on Charles and his Queen. The treaty was condemned by both nations.²⁸ Twenty-two years later Cromwell, in time of peace, seized Aca-

dia, on the ground that the cession was unconstitutional. He also, perhaps through the influence of his son-in-law, permitted Kirke, a royalist patentee, to return to the island.²⁹ But Kirke was not long continued there, as his endeavors at colonization were opposed to the interests of the merchants who conducted the Fishery from England. It is noteworthy that in Cromwell's time appeared the Navigation laws, designed to make England a great naval power, and to that end forbidding exports from the colonies except in English vessels. These restrictions were endured while trade remained inconsiderable, but were destined, with the expansion of colonial commerce, to bring about revolution and separation.³⁰ Through the vicissitudes and the romance of De la Tour's career, Acadia was regarded as English ground, until the treaty of Breda handed the territory a second time to France. The New England colonies still continued their attacks, but the French at Port Royal were strong enough to both check and menace the English settlers.

In 1686 the treaty of London left the claims of England and France still doubtful. Both parties took advantage of this omission

to continue their feuds. At the commencement of the hostilities that were to end in the peace of Ryswick, Louis XIV. proposed that America should be exempted from the operations of the war. William III. refused. Had he accepted, his authority could hardly have restrained the chronic expeditions against the French.

The northern colonies were incapable of peace. During the war Phips failed in an attack on Quebec, but reduced Acadia and established an English government. His men were rewarded with the first issue of colonial paper money. To surrender their conquests at the peace in 1697 was a bitter disappointment for New Englanders, especially as the war in America was avowedly undertaken to recover the Fishery, which had unfortunately excited the jealousy of the English trade, and, in consequence of violations of the Navigation laws, the mistrust of the government as well. The French without delay claimed a monopoly from Maine to Labrador, and sent a frigate to seize all colonial fishing vessels east of the Kennebec. In the reign of Queen Anne, the French seemed bent upon retrieving in America their

disasters upon the continent of Europe. They had five hundred sail in the Fishery. They were well armed; had distanced their competitors; were the first in the European markets, and sold their fish at the larger profit. They were actually in peaceable possession of every important station on Newfoundland before the end of the war.

The Massachusetts fishermen, on the other hand, swept the coast of Nova Scotia, twice attempted the seizure of Port Royal, and furnished two complete regiments and the transportation to Nicholson, when he captured that town in 1710.

The terms of the treaty of Utrecht at the close of this war, in 1713, were, as regards America, in the nature of a commercial arrangement.³¹ By the thirteenth article, Newfoundland, with the French stronghold of Placentia, was given to England. The French were to be allowed to dry and cure on the coast from Bona Vista, around by the north to Cape Riche, a range inferior to their previous stations on the south. They were not to fortify or to be engaged on the coast, except during the fishing season. England was to have Nova Scotia, Acadia, "accord-

ing to its ancient limits," and Port Royal, now rechristened Annapolis. Moreover, the French Fishery was not to be carried on within three leagues of the English coasts, and in revenge for their stubborn defence of Acadia, the French were to keep thirty leagues out to sea, south-west of Cape Sable.

Beside this acknowledgment of fishing claims, the Hudson Bay Company acquired an immense territory and Spain contributed the Assiento contract, whereby to England was assigned the exclusive right to furnish the Spanish West Indies with slaves.

The treaty was very unpopular.³² France, it was said, ought to have lost the Newfoundland and the entire coast Fishery. French chicane had triumphed in effecting the exchange of Acadia for Cape Breton and the other islands in the Gulf of Saint Lawrence. If the French stations were the best, their retention by commercial rivals must interfere with colonial profits; if worse, the quarrels would not cease. Queen Anne died of apoplexy after a stormy meeting of her cabinet, at which the articles of the treaty were discussed. Oxford, whose influence was supposed to have been for concession, was im-

peached. Nova Scotia, now permanently in the possession of the British crown, was almost uninhabited. The agents of Massachusetts opposed its colonization, as New England fishing vessels had already begun trying for fares on its coasts. The military government was obliged to fill up its council from the garrison. The country remained unfrequented, except as a fishing ground, until 1748, when Halifax was founded.³³ The English colonists did not have long to wait for the confirmation of their misgivings in regard to Cape Breton. Considerable money had been spent in making the town of Louisburg, on that island, imposing, if not impregnable.³⁴ Known as the "Dunkirk of America," it was the rendezvous of the French navy and merchant marine and the centre of a lucrative fishery. Disputes as to whether it belonged to the English, as within "the ancient limits of Acadia," had arisen in the commission appointed under the treaty. It was asserted that since the peace the French had carried on "an unbounded fishery." The inconvenience of such prosperity and naval strength between Newfoundland and Nova Scotia was strongly urged, as well as the command

of Canada, that possession of the island would give.³⁵ The governor of Massachusetts finally obtained the consent of his council to an expedition against Louisburg. Pepperell, the son of a fisherman of Mount Desert, was given the command, while Massachusetts furnished three-fourths of the troops to co-operate with the English admiral, Warren. The colonial army landed on the island May 30, 1745. Louisburg fell June 17, a long interval, as it seemed to the besiegers, who terrified the French by their reckless courage.³⁶ The English fleet co-operated loyally with the colonists, but had contributed little to this exploit, beyond the capture of a French frigate on the way to relieve the garrison.³⁷ There was extravagant joy in England and America. Louisburg, it was claimed, counterbalanced the ill success of England on the continent of Europe. Chesterfield wrote: "I would hang any man who proposed to exchange Louisburg for Portsmouth." Yet Hanoverian interests asserted themselves at the expense of the colonies, and Louisburg was restored to France by the treaty of Aix-la-Chapelle in 1748.³⁸ The town was rebuilt. Disputes over the

boundaries still continued, the English commissioners claiming that the Penobscot was the western frontier of Nova Scotia. In Newfoundland the question was as to the location of Cape Riche. As France was known at that time to be strengthening her marine, Holderness, one of Her Majesty's secretaries of state, recommended to the colonial governors a confederation for mutual defence. French diplomacy seemed capable of retrieving all her disasters. The English attempted to detach Spain from France, promising to acknowledge the Spanish claim to participation in the Fisheries.³⁹ Spain, fortified by a dispensation from the Pope, replied by prohibiting the importation of foreign fish. The English fleet, using Halifax as a naval station, occupied Placentia, and aided by the "Royal Americans" recaptured St. Johns. Trade was secondary to war. The merchants of the colonies who engaged in it at all shipped negroes and Indians to complete the crews of their vessels. By a second siege, and the employment of a force, immense in comparison with the former operations, Louisbourg surrendered to Lord Amherst in 1758. Nearly one-third of the effective men of

Massachusetts were in the service. Wolfe sailed for Quebec the following year and added Canada to the roll of English possessions.⁴⁰ France, previous to the war, had succeeded in drawing a line of forts around the English on the seaboard. Her system had been thoroughly feudal. The more active among her American subjects had, in consequence, become "Coureurs de bois," or had drifted among the English. Canada might long have remained a military government, supported systematically from France. The Court, however, was thoroughly European in its aims, and the province, assisted at caprice, was abandoned in extremity. Out of this wreck the French succeeded in saving the use of the Newfoundland coast from Bona Vista around by the north to Cape Riche, beside the little islands of St. Pierre and Miquelon, the latter under restrictions that rendered it impossible to use them for anything more than a shelter. The three-league limit was enforced; expanding to fifteen leagues off the coasts of Nova Scotia and Cape Breton.⁴¹ Mr. Pitt, supported by the London merchants and the colonists, had favored the total exclusion of the French from the Fisheries.

Bedford, believing that such a proposition would stop the negotiations or lead to a renewal of hostilities, departed from his instructions by consenting to a modification of these terms.⁴² Careful observers on both sides anticipated the result of the treaty of Paris concluded in 1763. Montcalm was consoled for the loss of Canada by the thought that the English colonies would revolt in ten years. De Vergennes considered the cession a happy arrangement, under the circumstances.⁴³ At one time there was a sentiment in favor of exchanging Canada for Guadaloupe, but other views prevailed.⁴⁴ As it stood, the treaty was unsatisfactory. The privileges conceded the French were declared to be equal to all Canada. Bedford was accused of bribery. The French at St. Pierre were watched and misrepresented. The malcontents could only console themselves with the reflection that the French, if deprived of the Fisheries, might retaliate by the exclusion of English fish from the markets of France and her colonies. Freed from the attacks of the traditional enemy, the Fishery was taken up with energy and encouraged by the exemption from taxes of boats and tackle. As the

basis of a flourishing trade, the merchants who furnished the capital were willing to take many chances and could sustain considerable losses. Statistics of the Massachusetts whale and cod fisheries in 1764 estimate the value of the business at almost £155,000 sterling.⁴⁵ England did not take one-third of the marketable fish. They were sent to France, Spain, Holland, Madeira, the southern colonies and later to Brazil and Paramaribo.⁴⁶

The West India Islands were consumers of the poorer qualities. In exchange for their fish, the colonies obtained rum, bullion, bills of exchange or commodities, accepted in payment of English manufactures. The importance of the trade was so thoroughly appreciated that in the State House at Boston hung a painted codfish, a constant reminder to the legislators of the "staple of the Massachusetts."

Careless destruction of river fish had in a measure driven the cod from the immediate vicinity of the New England fishing towns, but the fishermen now had the range of the north-east coast to Labrador. The wealthier firms established stations at Canso or in the Bay of Chaleurs. As soon as a more strin-

gent application of the Navigation laws checked the export trade, the irritation of the colonial merchants appeared. Parliament decided to enforce these regulations, and to that end armed the captains of the English men-of-war and revenue cutters with the powers of customs officers.⁴⁷ Deprived of their markets and threatened with the extermination of smuggling, the merchants became more and more rebellious. The passage by Parliament of an act making molasses and sugar, the product of the West Indies, dutiable in colonial ports, gave to the French and English a virtual monopoly of the Fisheries. Vessels formerly engaged in the carrying trade were freighted with the fishing plant and sold abroad.

Only evasions of the law and the growth of the inter-colonial market sustained the industry. On the eve of the Revolution the fishing towns were fairly prosperous. Stephen Higginson testified before a committee of the House of Commons, pending the consideration of a bill framed to punish rebellious New England by depriving her of participation in the cod fishery, that should the measure pass, over six thousand two hundred inhabitants of

Massachusetts would loose their means of livelihood, and ten thousand persons must seek employment elsewhere.⁴⁸ Before the beginning of the Revolutionary War, New England had lost the ancient Fisheries—as far as Parliamentary action could go. “No taxation without representation” was not merely a convenient phrase; yet duties not for revenue, but tending to circumscribe commerce, were almost as obnoxious as direct taxes.⁴⁹ One of the arguments in favor of a successful revolt rested on the strong probability of effective assistance from abroad.⁵⁰ Thirteen years had fulfilled the anticipations of the French statesmen. Not that they mistrusted the colonies the less, but that they disliked England more. The United States Government, before the declaration, had dispatched an agent to France. French aid began, covertly, before the war and continued after the result was no longer in doubt. Among the inducements offered by the American commissioners to obtain recognition was a joint conquest of Canada and Newfoundland, and the division of the Fishery between the French and the United States governments. This was never seriously contemplated by France. Before

the end of the struggle, French diplomacy preferred that England should retain Canada, and that the limits of the new republic should be curtailed.⁵¹

Upon the arrival of Mr. Jay in Paris, early in September, 1782, the negotiations that were to result in a definite treaty of peace were already in progress.⁵² Peace had long been desired by both parties. It had several times been attempted, but could make no headway against the repugnance of George III. to any acknowledgment of American independence, and the artificial identity, in consequence of the general war, of American, French and even Spanish interests. When in March, 1782, the ministry of North fell, and what was more significant, when the king had reluctantly consented to acquiesce in American independence as a condition precedent to the formation of the Rockingham ministry, Franklin, at Passy, anticipated the new home secretary, Lord Shelburne, in a letter inviting an interchange of views. Less than a month afterwards Oswald was in Paris, not in the character of a formal negotiator, but as the confidant and representative of Shelburne who was anxious to prepare the way for a regularly ac-

credited commission. It was to Shelburne's secretaryship that negotiations properly belonged, and it was not intended that Oswald should add to the difficulties of his situation by overtures addressed to any but the representatives of the colonies. Franklin was identified with American diplomacy, and as minister to France he was under general instructions relative to a treaty. Among the necessary conditions which he forthwith indicated to Oswald, there were three of major importance: Independence, The Boundaries, and the ancient fishing Franchises. Oswald returned to report progress. His government was willing to admit independence. The remaining points did not exclude the possibility of an adjustment. Thus far the obstacles in the way of a convention had been surmounted, but another annoying delay now arose in consequence of the relations existing between Shelburne and Fox. Under the impression that Oswald's mission was a trespass upon his province, as Foreign Secretary, of treating with the European powers, Fox had sent Grenville to Versailles,—a young man whose partisanship and personal characteristics displeased alike Franklin, Oswald and De

Vergennes. Grenville's communications to his principal soon precipitated a misunderstanding in the English cabinet, that finally, on the formation of the Shelburne ministry, resulted in the secession of Fox to the opposition.

On the 27th of July Oswald had been authorized to modify the original English position, and on the 7th of August he had received his commission to treat separately with the representatives of the colonies. At this stage of the negotiation, Jay arrived from Spain. With the exception of Franklin, he was the first of the Americans on the ground, under the commission for a peace, issued by Congress on the 8th of June. Jay's opinion of French and Spanish policy had undergone a radical change. Formerly the advocate of a triple alliance between America, France and Spain, his experience during an official residence at Madrid had convinced him that neither France nor Spain desired to see the United States a dominating force at home or abroad, however ready they might be to use American pretensions for their own advantage, in the terms of a general peace. With the arrival of Jay began the diminution

of cordiality between the American commission and the French Court, that culminated in the signing of a separate treaty by the Americans without an official communication to De Vergennes of the progress of the negotiations, a proceeding forbidden in the instructions of Congress. Every day marked the divergence of American as distinguished from French and Spanish interests. The latter dreaded the influence of a great republic upon her western colonies, and the former, by surrounding the young government with powerful enemies, hoped to render it amenable to French influence. This design was suspected, and presently confirmed by the news of a secret mission to Shelburne, assumed by the French under secretary of state, through whom the French Government expressed its determination not to recognize the American claim to the Ohio territory, besides hinting at the entire exclusion of the United States from the Newfoundland and the Gulf Fisheries. De Vergennes himself, in correspondence with his minister at Philadelphia, characterized the American demands as absurd. Further proof of the intentions of France, in the form of an intercepted letter,

was placed by the English secret service, at an opportune moment, in the hands of the American commission. All parties now desired peace. France could expect nothing from a continuation of hostilities. Spain despaired of obtaining Gibraltar, and England wished to conclude with the United States because she could then force the French and Spanish courts to an ultimatum. The phraseology of Oswald's instructions having been altered, in deference to the objections of the American commission, the differences were mainly in regard to the Fisheries, the English creditors and the loyalists. On October 5th, Oswald had accepted an article permitting the United States to dry their catch on the shores of Newfoundland. His government, noticing this too "pacifical" humor, thereupon added Strachey, an under secretary in the Home Office, to the English commission. This gentleman achieved a diplomatic victory at the outset, owing to an unguarded, but sincere, remark of John Adams, who had just reinforced the other side. Adams had not been presented to De Vergennes when he met the English commissioners in Jay's apartments. Strachey de-

manded, in the course of conversation, that the liability of all American debtors to their English creditors should be acknowledged by the treaty. Adams replied, off hand, that he had no objections to such an article. On this point Franklin had stood out. The losses inflicted by loyalists more than balanced the account, in his opinion. He subsequently yielded, contenting himself with a letter to Townsend in which he rehearsed the practical difficulties in the way of collection. Adams' convictions, as well as his special knowledge, stiffened the claim to the Fisheries. After a long discussion, the liberty of the Americans to cure and dry was transferred from the coast of Newfoundland to the uninhabited coasts of Nova Scotia, the Magdalen Islands and Labrador, as long as they remained unsettled. In the event of settlement, the rights of inhabitants, proprietors or possessors of the ground, were to be recognized. Franklin remodelled the article to include the right to take fish not only on the Grand Bank and on all the other banks of Newfoundland, but also in the Gulf of St. Lawrence and all other places in the sea "where the inhabitants of both countries

used at any time heretofore to fish." Up to this point the British ministry had conceded. They allowed territorial claims. They had granted the Maine frontier and they had virtually granted the Fisheries, but with reference to the indemnification of the loyalists, the King, the Opposition and the Cabinet, leaving out Shelburne, Pitt and Townsend, united in the declaration that they would rather continue the war than submit to a compromise. The English commissioners wished the Americans to understand that this was an ultimatum. The objection on the part of the Americans that they were not empowered to treat on this subject, was met by the insinuation that their full powers could be proved in their instructions from Congress. Shelburne added that the treaty in its present form would certainly be rejected by Parliament. Franklin's opposition to indemnification had been constant and active, but he recognized the truth of Shelburne's statement. There was another conference between the English commissioners and their government. A new instrument was drawn and Fitz-Herbert, of the Foreign Office, became a member of the English commission, to bring

French pressure to bear on the Americans. De Vergennes was known to be in favor of indemnification and of the English claims in general. On the very day that the English commissioners received their instructions, De Vergennes wrote that France would no more prolong the war to support the American claims to the Fisheries, than would America to gain Gibraltar for Spain. Two days later George III. urged Shelburne to propose to Louis XVI. the denial of the Fisheries to the Americans. The third article of the treaty seemed to the King vague, and likely to prove a source of future complications. Before this recommendation could receive attention the commission met. Strachey explained the concession in the English instructions relative to the Fisheries, and concluded that indemnification was to decide the fate of the negotiations. Pressed by Jay, he admitted that this was not an ultimatum. The discussion continued for four days. On November 29, the commissioners again came together. All the Americans, including Laurens, were present. Strachey scored another triumph here. It was promised that no further confiscations of loyalist property

should take place, and that Congress should recommend to the several States an amnesty and general restitution. The last words on the Fisheries were between Adams and Oswald. It was resolved to allow the Americans rights co-extensive with those of English subjects, except the local restrictions on drying the catch. Strachey and Fitz-Herbert wished to refer the articles, in their present form, to the English Government. This would have necessitated submitting them to Parliament. Franklin, anticipating the danger, replied that then the question of the English creditors ought to come again into discussion. This was Strachey's advantage. Rather than imperil it, he withdrew his objections to an immediate signing. Fitz-Herbert, knowing that the conclusion of peace with the United States would force terms upon France and Spain, also gave his consent. Oswald's power permitted him to sign with the concurrence of his colleagues. The provisional treaty was accordingly signed on the 30th of November, 1782. Its definitive character had been fixed in the preamble.⁵³ Adams alone of the commissioners escaped the imputation of lukewarmness toward the

American claims to the Fisheries. The history of the negotiations indicates that the reflection was unjust to Franklin and Jay.

Sentiment in the United States was not unanimous. Samuel Adams hoped not only for the Fisheries, but for Canada, Nova Scotia and Florida. In March, 1779, Congress voted that the common right of the United States in the fishing grounds should in no case be given up. The month had not passed before the resolution was reconsidered in deference to the French interests. In May, independence was made the sole condition of peace with Great Britain. But the discussion had to be reopened, and through the exertions of the New England deputies it was resolved to insist upon the Fisheries. New England declared that her prosperity depended upon the ancient franchises. Sectional feeling developed. A resolution offered in June, that the Newfoundland Fisheries must be guaranteed by France, provoked an acrimonious debate. New England won—but four States threatened to secede. In July the question of the Fishery was reserved for a future treaty of commerce with Great Britain, the proposition to insert it in a

treaty of peace having been indefinitely postponed. This conclusion did not vary. On the appointment of a commission to negotiate a peace, the common right of fishing was not made an ultimatum. It was simply declared to be of the utmost importance.

The English objected to the word "right" in connection with drying and curing the catch on English territory, and "liberty" was substituted in its place.⁵⁴ John Adams' statement of the American case remained, theoretically, the position of the United States Government in the convention of 1818. At this time there were some Englishmen, notably Admiral St. Vincent, who would willingly have abandoned Canada to avoid the anticipated trouble of holding it. During the war Newfoundland had remained loyal. At first, riotous demonstrations against the custom-houses had indicated some sympathy with the Americans. Latterly the island suffered from the non-importation agreement recommended by the American Congress, and from American privateers. After the war the cruelties formerly enforced against the settlers abated. A better system of government was also inaugurated. Newfoundland re-

mains the principal cod fishery of the world. Both French and Americans are admitted, under treaty, to the in-shore waters.⁵⁵ During the Revolutionary War, Halifax was an English naval station, the refuge of American loyalists.⁵⁶ So many of these people wished to leave the United States that the evacuation of New York had to be delayed until transports could be furnished them.⁵⁷ Rewarded with office and grants of land in uninhabited Nova Scotia they became the ruling party on the north-eastern frontiers of the United States. These regions had been almost without a population.⁵⁸ Attempts at revolution were suppressed by the English garrison and the minority reorganized the government, on paper, from the safe distance of Philadelphia.⁵⁹ The fishing privileges of the treaty were gained after a comparatively easy diplomatic struggle, but the negotiations nearly went to pieces over the indemnification of the loyalists. Congress recommended amnesty and restitution, as had been promised. The States, however, were in no temper for such legislation. It was most unfortunate for the quiet enjoyment of the Fishery under the treaty, that so many men with a

grievance inhabited the shores where the liberty was to be exercised.

England, now in direct competition with the products of the American Fishery, was not without the power to obstruct the American trade. In July of the same year that the treaty was signed, an order in council prohibited the importation of American fish to the markets of the English West Indies. Congress wished to meet the emergency and asked of the States permission to retaliate. This was not given. In the constitutional convention Pickering said that the New England States had lost everything by the war. In the first Congress, Fisher Ames declared that West Indian molasses had been counted upon in exchange for the fish that could not be disposed of elsewhere. He concluded that if the West Indian demand for fish were injured, "we cannot maintain the fisheries." Extraordinary measures were presently adopted to sustain the failing industry.⁶⁰ By an act of 1789 a bounty was granted on the various kinds of marketable fish. It was considered insufficient. By another act, in 1792, the bounties were abolished, and a specific allowance was established, according to

tonnage. In spite of objections based on the unconstitutionality of a pecuniary encouragement to an occupation, the system was continued down to the reciprocity treaty of 1854.⁶¹

The volume of commerce carried on between Great Britain and the United States was greater than before the war. The two nations divided the carrying trade of the world, yet all efforts in behalf of the Fisheries were pronounced hopeless, in the face of British opposition. A committee of Congress reported in 1802, that it was doubtful if the United States employed as large a tonnage and as many men in the whale and cod fishery as before the Revolution. Merchants complained that the market was glutted with British fish. Regrets for the good old privateering days of the war were frequently expressed. From prosperity the fish trade fell away until 1814, when the value of fish exported was only one hundred and twenty-eight thousand dollars.⁶² A very unpopular measure in New England was the Embargo. It was partially evaded by the use of small boats in the South American trade. Fish spoiled in the warehouses or were confiscated

in the ports of Europe. Meanwhile the population of Nova Scotia had doubled and became alive to local interests. The operations of American fishermen, under the late treaty, were jealously noted. They were accused of taking away the English trade; of smuggling and enjoying privileges in contravention of public law. Watchers counted the American fishing fleets as they passed the Strait of Canso. The home government, in consequence of colonial representations, was brought to the conclusion that the treaty had granted too much.⁶³ It was felt that something ought to be done for the loyalists of Nova Scotia and New Brunswick, many of whom expected that the result of the hostilities would reinstate them in their old homesteads.

In 1814 a British squadron commanded for a time the Maine and Massachusetts coasts, exacted tribute from the salting establishments on Cape Ann, and entirely suppressed the use of any but fresh fish. On land there was some ground for the remark of the Russian ambassador, that "England did whatever she pleased." The American commissioners, who signed the treaty of 1814 before

the news of the battle of New Orleans, were aware that a strong party at home wished peace on almost any terms.

England made territorial claims, and, as an inducement for their consideration, offered the old fishing privileges stated to have been abrogated by the war. The instructions of the United States commissioners were to obtain peace and preserve the Fishery. The British Government refused to accept, in exchange, a renewal of the previous English right to navigate the Mississippi.⁶⁴

In 1782 part of the river was supposed to be in British territory, but this was now known to be an error. England maintained that her right of navigation had also been abrogated by the war. The negotiations were marked by considerable temper on both sides, and the Americans quarrelled among themselves. Peace was concluded, but nothing was said in the instrument concerning the Fishery. England lost the navigation of the Mississippi, which she had never used. The theoretical basis of the American claim does not appear to have been clear in the minds of eminent American statesmen. Gallatin wrote to Monroe that on the subject of the Fisher-

ies the commission had done all that could be done.

The only equivalent they had to offer was the navigation of the Mississippi, and that had been refused. The British Government at once proceeded to enforce its interpretation of the treaty.⁶⁵ United States fishermen were seized off Cape Sable, outside of the three-mile limit, but the British chargé d'affairs at Washington replied to Mr. Monroe that the captain of the English war vessel had exceeded his authority. Other vessels were now seized, some for good reason. It was resolved to hold a convention between the countries to define their respective fishing rights.

The American case, developed in the correspondence of John Quincy Adams, rested on immemorial usage, discovery and part conquest, and on the nature of the treaty of 1783;⁶⁶ whether England at that time had acknowledged the inherent right of the United States to the Fishery in British waters.⁶⁷ To minds unacquainted with the peculiar relations of the colonies to the Fisheries before the Revolution, or without sympathy for the interests of the American trade, the de-

mands of the United States were incomprehensible. Therein lay the weakness of the American position. Selfish considerations aside, De Vergennes could honestly say that to claim the privileges of subjects after renouncing allegiance was unprecedented.⁶⁸ In fact, had the maritime provinces of Canada been populous at the signing of the first treaty the insecurity of such an arrangement must have led to some modification of the terms. Fishing in the open sea was then acknowledged to be free to all the world, and this general principle would have given the United States the cod fishery on the banks.

Within three miles of the coast riparian jurisdiction was the rule, and every vessel crossing the marine boundary must, at the pleasure of the riparian state, conform to the regulations, including tolls for the use of establishments for the purpose of navigation and fishing. These restrictions could be modified only by treaty.⁶⁹ American use of the Fishery was not immemorial to the time when the colonists fished as subjects of the king and in virtue of permission granted in their charters. Discovery, development and defence of the Fishery were equitable claims,

but to make them effective, in the presence of a hostile population, the shores where they were to be enforced should have been conquered and retained. Of the treaty itself it was asserted that it was in the nature of a deed of partition. The grant of the Fishery was analogous to the cession of territory or the demarcation of a boundary. It was urged that the sequence of the treaty, as shown in the acknowledgment of independence, the cession of territory and the settlement of boundaries made it an instrument permanent in its provisions.⁷⁰

Of the later view, that the Third Article was an executed grant, acknowledging a permanent servitude, it may be questioned whether the participation of British subjects in the Fishery, on equal terms with the people of the United States, does not exclude such a theory.⁷¹

The American argument was not convincing, because the third article is susceptible of a different interpretation.⁷² The British Government could and did reply, that the permanent part was not only distinguishable from the temporary, but that it was thus distinguished by the treaty itself, which mentioned

the "right" to fish on the Grand Bank and all other places in the sea, but only of the "liberty" to dry and cure on certain uninhabited coasts. And further, that the privilege of drying and curing, if intended to be permanent, would not have been made determinable by the settlement of the coast line.

Both governments were inclined to press their opinions. John Quincy Adams, in conversation with the British minister at Washington, thought that the nations would have to fight and ought to.⁷³ Mr. Gallatin wrote to Adams from London, that the provisions of the third article were obnoxious to British pride, and that no treaty stipulation could provide for the security of the American interpretation, in the event of a war.⁷⁴

In the convention of 1818 the question of the Fishery, though not the first in order of discussion, was the first considered.⁷⁵ Misunderstandings menaced the peace of both countries. At length the first article of the treaty was inserted, under instructions from Mr. Adams, authorizing the United States commissioners to agree to a stipulation whereby the United States should desist from fishing, curing and drying fish within the Brit-

ish jurisdiction generally, on condition that these occupations should be secured as a permanent right, not liable to be impaired by future wars, from Cape Ray in Newfoundland to the Rameau Islands, and from Mt. Joly on the Labrador coast through the straits of Belle Isle, indefinitely northward along the coast; the right to include curing and drying the fish as well as fishing.

In the treaty, as concluded, the first article reads as follows: "Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, harbors and creeks of His British Majesty's dominions in America, it is agreed . . . that the inhabitants of the said United States shall have forever, in common with the subjects of His British Majesty, the liberty to take fish of every kind on that part of the coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands and also on the coasts, bays, harbors and creeks from Mt. Joly on the southern

coast of Labrador to and through the straits of Belle Isle and thence northwardly, indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company, and that the American fishermen shall also have liberty forever to dry and cure fish in any of the unsettled bays, harbors and creeks of the southern coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same shall be settled it shall not be lawful for the fishermen to dry or cure on such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays or harbors of His British Majesty's dominions in America, not included in the above mentioned limits. Provided, however, that the American fishermen shall be permitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water and for no other pur-

pose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein or in any other manner abusing the privileges hereby reserved to them."

Originally the final proviso permitted the American fishermen to enter for the purchase of bait, "tinker mackerel," or herring cut into pieces. This was subsequently omitted with the consent of the American Commission. The mackerel fishery had not as yet assumed large proportions. Its subsequent importance was unforeseen and naturally unconsidered. No licenses to mackerel boats were issued prior to 1828.⁷⁶ Cod were seldom pursued within the three-mile limit. In the cod fishery it was not a very valuable concession to purchase bait. But to land and cure, on the contrary, were great conveniences. By the convention the United States in this respect were better off than before. The bargain was not considered bad. All fisheries not guaranteed by the treaty were expressly renounced, and purposely, to exclude the implication that the rights obtained were in the nature of a new grant, to place the liberty now secured on the same permanent basis

and to make it appear expressly that the renunciation was limited to three miles from the coasts.

Gallatin wrote from the scene of the convention that if compromise must come, now was the time. No court in England would interpret the former treaty from the United States' standpoint. If the matter were not arranged, immediate collisions must ensue. We then would have to fight." Mr. Adams said: "This secures the whole coast fishing three miles from the shore." For the next few years bounties on tonnage, drawbacks on salt duties, license fees, exemption from entry and clearing charges, the enterprise of the American fishing industry and the superiority of their fleet over the Canadian boats, rendered the business, on the whole, prosperous.⁷⁸

With time, Provincial, in contradistinction to British interpretation of this treaty, and notably the unfriendly spirit of provincial regulations, was responsible for a feeling of irritation, so pronounced as almost to have invited a war. In 1819 an act of Parliament, empowering the King to make Orders in Council for regulating the Fishery and imposing

the penalties of fines and confiscations for trespass, was used by the Provincial legislatures to set a premium on interference with American fishermen.⁷⁹ The growth of the mackerel fishery, the habit of the fish to run in shore, "chumming,"⁸⁰ viz., the throwing out of surface bait, an oily mixture of porgies and clams, and the fact that half the American mackerel fleet visited the Gulf of St. Lawrence and the Bay of Chaleurs, *via* the Strait of Canso, increased the temptation of the Americans to transgress the three-mile limit and intensified the determination of the inhabitants to enforce a strict interpretation. Only one vessel was seized in 1823. In 1824 nine were taken. The following year, petitions from merchants and fishermen induced the United States Government to send a war vessel to the fishing grounds.⁸¹ The representations of the United States Government remained without an answer, nor had the British Government received a reply to their note. The State Department incurred the reproach of inactivity. American vessels, said to have committed no serious infraction of the convention, were chased about by British and Provincial captains on charges of

hovering, fishing within the three-mile limit, purchasing bait, selling goods, or landing and transshipping fish, while the inhabitants of Nova Scotia petitioned for more stringent enforcement and passed an exceedingly unfriendly act, that gave to "cruisers" and customs officers the power to harass or detain American fishing vessels and to confiscate the property of American citizens. The manner in which these provisions were enforced varied. Leniency and harshness depended on the discretion or temper of the officers on duty. It was entirely a question of interpretation of the first article of the treaty.

Hostility culminated in 1841, when the government of Nova Scotia submitted to the Crown lawyers a series of questions, on which their opinions were sought, as a basis for future legislation. These involved the right of the United States, under the convention of 1818, to navigate the Strait of Canso, to fish in the bays of Fundy and Chaleurs, and to land on the coast of the Magdalen Islands. The Crown lawyers replied, that bays were to be measured from headland to headland, that the three-mile limit should be drawn at right

X Inaccurate and
defective.

angles and outside of such an imaginary line ; that the convention of 1818 did not negative the right of the United States to navigate the Strait of Canso, but that independent of treaty, no foreign state possessed such a right. Also, that by the terms of the convention American fishermen were prohibited from landing on the shores of the Magdalen Islands.

As a general principle the exclusive jurisdiction of a government over its bays may be asserted, and no other reason than its own convenience need be alleged. The United States has so asserted it, and has in some cases drawn the line from headland to headland,⁸² yet it was fair to conclude that the convention of 1818 should be interpreted in a friendly spirit, as intended to give to American fishermen every advantage compatible with the terms. On general principles also, the right to navigate a strait was no infraction of the territorial jurisdiction of the state in possession of both shores, but was controlled by the right to navigate the seas thus connected.⁸³ The Strait of Canso separates Nova Scotia from Cape Breton.⁸⁴ It is twenty miles long and in one place not more than a

mile wide. In 1820 the government of Nova Scotia annexed Cape Breton and laid out counties across the strait. All vessels used the passage on their way from the Atlantic to the Gulf of St. Lawrence, as it avoided the long and dangerous circuit around the Island of Cape Breton. The American fishermen had thus used it since the beginning of the Gulf Fishery, and had paid tolls, when, by the McLean arrangement, British vessels were passing and repassing unmulcted through Long Island Sound. As for the Magdalen coasts, the locality is a herring, not a cod, fishery. These fish were taken in seines or in weirs built on the beach, almost within low water mark. The convention conceded the liberty to take "fish of every kind" on the shores of these islands. As it was intended by the convention to give the herring fishery, the right to land is accessory to its prosecution.

On the arrival of the opinion of the Crown lawyers in Nova Scotia, the authorities proceeded to employ its convenient law, as if it had been communicated to, and acquiesced in by, the United States Government. They did not get a fleet from England, though they asked for it. Raising a small force of their

No
No

own, they denied the right of passage through the Strait of Canso, an arbitrary act, at variance with the sentiment of the home government, opposed to English public opinion, and a hostile demonstration against a friendly power. They prevented Americans from landing on the ~~Magdalen Islands~~, and on the 30th of June, 1843, they seized a little American vessel, the *Washington*, ten miles from the shore in the Bay of Fundy. Mr. Everett, the American minister to England, protested. The British Government apparently willing to avoid extreme measures, except when under colonial pressure, offered to admit our fishermen to the Bay of Fundy. Mr. Everett did not regard this as a concession, but accepted it as a right. When the news of this disposition of the question reached Nova Scotia, the authorities protested to the home government. The protest was successful and the assurance was conveyed that England would adhere to a strict interpretation. The question was ultimately referred to a commission, in 1853.

The commissioners disagreed and left the decision to the umpire, Mr. Bates, of Baring Brothers, who ruled that no indentation of the coast, exceeding ten miles in width,

from headland to headland, could be considered a bay in the premises. An opinion, illustrating "the rational principles of International Law," followed in the Anglo-French treaty of 1867,⁸⁵ but not as yet accepted by the Dominion of Canada. At the root of the Provincial demonstrations lay the desire of forcing the United States into concessions of reciprocity. By adopting free trade England had curtailed her demand for the natural products of the British American provinces. Participation in the United States market, on favorable terms, thus became a primary object to the Canadians, and in 1847 the Canadian Parliament petitioned the Queen for reciprocity with the United States. England had followed the aggressive policy of the provinces with reluctance. She had followed, nevertheless. Until free trade triumphed, it was not her commercial policy to seek reciprocity. When the principle was adopted, a measure of free trade with the United States might be obtained through Canada. The zeal of the provinces almost defeated their end, under the impression that the tribulations of the American fisherman might be exhibited to his Government, as a reason for conferring a priv-

ilege upon his tormentors.⁸⁶ Statements in regard to the trade were contradictory. In England the utility of protecting the Canadians was questioned, as fish caught by British subjects could not be disposed of in Europe or the United States. It was useless to contend against the American bounty system.⁸⁷ On the other hand, modifications in the United States revenue laws were opposed, on the ground that Canadian fish already monopolized the export trade.⁸⁸ At this juncture Lord Elgin, then Governor General of Canada, arrived in Washington with the express object of negotiating a treaty. The "Nebraska Bill" was the absorbing event in political circles at the time. He was informed by the Pierce administration that the greatest hostility to the treaty might be looked for among the Democrats, and he set about to overcome it with so much tact and the quality since recognized as "personal magnetism," that at the conclusion of a fortnight the negotiation of seven years' standing between the governments was brought to a successful termination. There was a good deal said, intimating that the treaty had been "floated through on champagne," but there

were graver forces behind it, for while returning toward the seat of his government Lord Elgin was fêted not only in Canada but on the American seaboard. Curiously enough the Canadian fishing interest took alarm. While the treaty passed the United States Senate, the maritime provinces of Canada, not at that period confederated, made a sharp although brief resistance.⁸⁹ Thus reciprocity came in 1854. Canadian natural products were admitted into the United States free, and fishing rights, analogous to those of 1783, were granted in exchange.⁹⁰ This time there was no doubt as to the consideration. Canadian trade quadrupled, and the American fishermen were easily tolerated all along the provincial coasts, until the termination of the treaty by the United States in 1866. The tonnage of the American fishing fleet had increased, but the Canadian trade prospered to such an extent that the American fishermen dreaded the growing competition. There had been complaints of the commercial policy of Canada during this period, and a stronger feeling towards its close.⁹¹ From an unnatural cordiality, on the eve of the Civil War, the English Government and ruling class sud-

denly changed to an attitude of unfriendliness amounting to insult, a disposition to avail themselves of the difficulties of the United States amounting to menace, and the permission of operations by the Confederacy almost amounting to war.⁹² Canada was the rendezvous of British armies and navies. There was talk of making it a strong military power and of annexing Maine.

It was the refuge of the most venomous of the enemies of the United States. When the hands of the Federal Government were free, reciprocity with Canada ceased on notice, and Napoleon was requested to abandon Mexico. Little attention was paid to the complaints of the provinces, that their wishes had not been consulted in the abrogation of the treaty and that the Americans continued to fish as before in spite of the proclamation of the President. American fishermen were allowed within the three-mile limit for a time, on the payment of a license fee of fifty cents a ton. This was afterwards raised to two dollars. The fourth year only twenty-five small vessels cared to purchase the privilege, the larger ones being willing to take their chances outside.⁹³ All foreign

fishermen, by Dominion acts of 1868 and 1870, and by an Order of the Governor General of Canada, were warned off Canadian waters and the nature of the restrictions was communicated to the United States Government, which in turn, by a treasury circular of 1870, called the attention of the American fishermen to the regulations. Canada, Nova Scotia and New Brunswick were united in 1867, and the Fisheries erected into a department under a minister. All intention of interference with American rights was disclaimed, but the spirit interpreting the enforcement of the laws remained unfriendly. Bait and supplies were denied. There was an intimation that the transshipment of fish in bond would be stopped, and the headland dispute was held in abeyance, pending some satisfactory arrangement with the United States. Canadian cruisers cost their government nearly a million of dollars in the years 1869 and 1870, and the practice of giving warnings ceased. Against the enforcement of these "technical rights" the United States Government protested.* The Canadian position was, that the Fishery needed protection, especially against the Americans who had

fished out their own waters ; that licenses were discontinued because the Americans did not care to buy them ; that the system of giving warnings had to be discontinued as they were not regarded, and that it was exceedingly difficult to discover interlopers in the bays. Also that three-fourths of the mackerel catch was taken within the three-mile limit, and that the cost of the cruisers and the protection of the home industry warranted a strict interpretation and enforcement of the convention of 1818.

Four hundred vessels were boarded for transgressing the three-mile limit. Fifteen were condemned, and one Canadian cruiser spent the winter of 1871 in the Bay of Fundy, thus saving, according to the Dominion reports, fifty thousand dollars' worth of fish to the natives. Canadian trade declined after 1866 more rapidly than it had increased during the treaty. A convention of Canadian merchants was held with the object of finding an outlet for colonial products in the West Indies.⁹⁵ The prospect was not satisfactory. Reciprocity again became the object of the Dominion Government. There were now a number of claims waiting

for adjustment between Great Britain and the United States. By far the most important were those arising from the depredations of the *Alabama* on American commerce. They had become more definite in consequence of their assumption by the United States Government. The Fishery Question offered a convenient excuse for a Joint High Commission.⁹⁶

One million dollars for the in-shore fishery, in perpetuity, was offered by the American Commissioners during the negotiations preceding the signing of the treaty of Washington. Freedom from molestation, rather than the profit of fishing in-shore, constituted, in their opinion, the value of this concession. The British Commissioners considered this sum inadequate and found insuperable objections to the transfer of the right. Finally it was decided to admit the United States to the Fishery in consideration of the remission of the duty on Canadian fish and fish oil, and the appointment of arbitrators to assess the value, if any, of the British concession in excess of the American, which included a free fishery on the United States coasts, north of the thirty-ninth degree of north latitude.

The convention of 1818 was recognized as the basis of this understanding. No limit was set to the amount of a possible award.

One commissioner was to be nominated by the President of the United States, one by Her Britannic Majesty, and in case the governments were unable to agree upon a third within three months, the nomination was to be made by the Austrian Ambassador at London. Canada protested in the first instance to the nomination of any foreign representative at Washington. The chairman of the English Joint High Commission had admitted the impropriety of the nomination of the Belgian minister in particular. After the lapse of the prescribed time and the failure of an attempt to renew the reciprocity treaty of 1854, the nomination devolved upon the Austrian Ambassador, who selected M. De la Fosse, Belgian minister to the United States Government.

The pertinacity shown by the British Government to obtain the appointment of this gentleman was apparent throughout the diplomatic correspondence, subsequently published. Had it been generally known at the time, it is extremely improbable that either

M. De la Fosse or his government would have consented to the choice. The impropriety of the selection arose from the peculiar relations existing between the Belgian and English reigning families. A delicate consideration, but none the less real.

The commission met at Halifax in 1877.⁹⁷ Mr. Kellogg represented the United States; Mr. Galt, a Canadian, Her Majesty's Government. M. De la Fosse acted as umpire at the request of both Powers. The discussion was ably conducted by counsel. The British case asserted the extent and value of the in-shore Fishery, the increase of the American mackerel fleet, and the privileges, included in the abolition of the three-mile limit, of procuring bait and supplies, transshipping fish and engaging Canadian crews. Not a single Canadian fisherman had used the American concession north of the thirty-sixth degree of latitude, under the treaty of 1854, because it was worth nothing, while three-fourths of the American mackerel were taken in the British waters.

Besides, the value of the in-shore Fishery should be estimated not by actual, but by its possible use. A million dollars a year was

asked for the privilege. The American case regarded the commission simply as a reference for an accounting. To admit one-fourth of the American catch as taken within the limit was a liberal allowance. A liberal equivalent was the remission of duties on Canadian fish and fish oil, amounting to three hundred and fifty thousand dollars annually. An award of five million, five hundred thousand dollars in favor of Great Britain was rendered the 23d of November, 1877. It was generally felt to be excessive in the United States and not to be accepted as a permanent measure of value. Canadian opinion was to the effect that the United States had the "sunny side" of the bargain.

The Canadian premier was taken to task, and the treaty ratified "out of respect for the Empire."

The treaty of Washington went into operation in 1873, to continue in force for ten years, and to be terminated by either party on two years' notice. In 1878 the Senate Committee on Foreign Relations reported that the Halifax award be approved, and submitted a bill providing for its payment. Mr. Hamlin, the chairman, suggested that Great Britain

might consent to a reduction of the award, on the ground that the commission had proceeded *ultra vires* in the consideration of extraneous matter, and on the inference that unanimity was required of the commissioners in rendering their decision. To this report an amendment was carried, providing that the remission of duties on Canadian fish and fish oil should be repealed as soon as consistent with articles XVIII. and XXI. of the treaty. A concurrent resolution was then passed, authorizing the payment of the award, if the President should consider that the good faith of the Nation demanded it. A curious proviso. In the correspondence that followed between Mr. Evarts and Lord Salisbury, the former resumed the ground taken in the report of the committee, and displayed, in addition, the returns of the American mackerel fishery for the four years already passed under the treaty, to show that the privilege was worth, at the highest computation, one hundred and twenty-five thousand dollars per annum, or one million, five hundred thousand dollars for twelve years. At a net valuation, twenty-five thousand dollars per annum, or

three hundred thousand dollars for twelve years.

The award was five million, five hundred thousand dollars, and the duty remitted the Canadians four million, two hundred thousand dollars. According to the one computation the United States lost nine million, four hundred thousand dollars ; according to the other, eight million, two hundred thousand dollars. The United States Government would not press its objections against the deliberate judgment of Great Britain. Lord Salisbury, in reply, admitted that Mr. Evarts' argument was powerful, but thought it capable of refutation. The British Government based their claim on the award, as it stood. To a second communication from Mr. Evarts Lord Salisbury made no reply. The award was promptly paid.⁹⁸

During the operation of the treaty American fishermen were on one occasion driven by a mob from the waters of Fortune Bay, Newfoundland, on the ground, as alleged, that they were fishing on Sunday, in contravention of the local statutes. The incident served to accentuate the difference that is so apt to exist between the Imperial and Colo-

nial interpretation of the fishery clauses of a treaty, as well as to mark the discrepancy between public and municipal law.

Treaty obligations were acknowledged to be supreme, but the question arose whether regulations, affecting both parties alike, were admissible.

Lord Salisbury took the ground, that the fishery rights were bought subject to existing regulations. Mr. Evarts contended that in such a case the rights were worthless, and the duty on Canadian fish should be revived to reimburse the sufferers by this particular act of violence. Lord Granville, who succeeded Lord Salisbury when the liberal government came in, conceded that local laws, in variance with Imperial treaty obligations, should be repealed as a matter of international obligation.

He objected to the theory that would make American fishermen wholly free from restraints, and defined the right to fish "in common" as existing under reasonable local regulations.

The British Government paid seventy-five thousand dollars damages for the affair at Fortune Bay, and an agreement was

made for drafting rules in regard to a close season.

The United States did not fail to give due notice of the abrogation of the treaty.⁹⁹ It expired July 1, in the midst of the fishing season of 1885; a provisional treaty, relating to fisheries, commerce and navigation, arranged by the English minister and the United States Government, having failed to pass the Senate in 1874. In answer to a note of the English minister, communicated in October, 1883, proposing a revision of the treaty, and recalling the allusion in President Arthur's message to the appointment of a commission, Secretary Frelinghuysen had replied to Mr. West in July, 1884, that action might better be postponed until the next meeting of Congress. The correspondence between Secretary Bayard and Mr. West covers the period from March 12 to June 22, 1885, and terminated in a temporary diplomatic arrangement, whereby the privileges of the recent treaty were continued to American fishermen during the year. On the other hand, it was understood that the President of the United States should recommend to Congress a Joint Commission "affording a prospect of development

and extension of trade between the United States and British North America." It was also promised that no limit should be set to the proposals to be brought forward by either party in the commission suggested.¹⁰⁰

Whatever steps had been taken by the United States Government, looking to the appointment of a commission, were brought to a standstill by the influence of the American fishing interest upon Congressional action.

Consequently the temporary arrangement for the season of 1885, proceeding from the good-will of the two governments, and finding a precedent in 1871, has not had the desired effect of avoiding misunderstanding.¹⁰¹ Canada considered that she had given valuable privileges for nothing, besides facing a duty of one per cent. a pound on prepared fish, levied in the interest of an American monopoly. The concession, in spite of all past experience, may also, in some quarters, have raised hopes of an indefinite postponement of any return to the state of things existing before the treaty of 1873. In the present attitude of the Dominion and Imperial governments there is nothing unusual. Citizens of the United States and subjects of Her Brit-

annic Majesty can find little satisfaction in the recent developments, except that the questions raised are still within the limits of rational and legal discussion. To this result the attitude of the government at Washington has certainly contributed.

Several American fishing vessels were seized by "cruisers" during the season of 1886. A few were fined. One is still in custody and one has been condemned and sold under circumstances that probably entitle her owners to damages. In more than one hundred instances there have been complaints of interference by Canadian officials. Correspondence between the United States and the Imperial Government has been constant.¹⁰² Throughout it occurs, like a refrain, the diplomatic formula of the English minister, resident at Washington, having the honor to acknowledge the notes from the Department of State and referring their contents to the Foreign Office. The Imperial Government, while obviously anxious to avoid difficulty with the United States, has practically adopted the Canadian defence of Canadian action, and cites, in justification, not only the Convention of 1818, the Act 59, George III.,

and the "British North American Act," but also legislation, having its inception in the Dominion Parliament, of ever-increasing stringency, culminating, during the past year, in an act evidently proposed to cover recent seizures and waiting Royal assent until November last. The effect of all this activity, taken in connection with the latest circulars issued to the Dominion custom-houses, has been a most technical interpretation of the Convention, the denial of any commercial rights to American fishermen in Canadian ports and the assumption by the Dominion Government of competency to decide on the validity of permits to "touch and trade," issued by an official properly qualified under the laws of the United States. This attitude is explained by a statement of the practice of the Dominion Parliament to make enactments for the protection of the Fishery, subject to the approval of the home government, an assertion of the authority of Canadian officials, whether their instructions emanate from the Queen, or from her representative, the Governor General, and a reference to the jurisdiction of the vice-admiralty courts, with an appeal to the Imperial Privy

Council. The general extension of commercial relations between the United States and Great Britain is acknowledged, and it is even intimated that a larger freedom is desired. At the same time it is objected that were the Canadian ports to become the base of operations for American fishermen, under cover of commerce, the Convention of 1818 would, to all intents and purposes, be repealed by the use of "touch and trade" permits. The United States Government has repeatedly and emphatically protested against the recent seizures and detentions, and through its minister at the Court of St. James denies that any laws exist authorizing these outrages. Moreover, were such laws extant they could not be invoked in a technical spirit, unworthy of sovereign and friendly nations. Mr. Phelps also maintains that the gradual extension of commercial privileges now expressly requires that each party shall allow to the vessels of the other in her ports the same facilities of trade as are permitted to her own shipping. Finally, as for the vice-admiralty courts, the question raised is not at all one of individual rights, but of international obligation, therefore Dominion courts have here no

jurisdiction. The subject is for the consideration of the representatives of the United States and the Imperial governments. It is well understood that the American interest does not claim the right to fish within the three-mile limit, except in the localities reserved by treaty.¹⁰³ The opinion expressed is to the effect that the concession is not of sufficient value to justify an enlightened selfishness in remitting the duty on Canadian fish, not to mention any extensive measure of reciprocity. The area outside, where the right is unquestionable, is abundantly sufficient, owing to the use of the purse seine. In spite, therefore, of various theories affirming that the mackerel hibernate on the Canadian coasts, or are kept in-shore by the influence of Arctic currents and acknowledging the capriciousness of the fish,¹⁰⁴ none of the American fleet have been seized during the past year, while actually fishing, and in only two instances for a technical attempt to fish. In almost every case the seizure has been complicated by a constructive evasion of the customs laws. While the United States Minister characterizes the strict interpretation of the Convention of 1818 as "preposterous,"

the Secretary of the Treasury, in admitting the resemblance between the customs laws of the two countries, reports that the behavior of the Dominion collectors has been "brutal."¹⁰⁵ Since 1823 the Presidents have had the power to discriminate against foreign vessels in regard to charges and duties in the ports of the United States. On the 27th of May, 1886, Congress added the suspension, at discretion, of commercial intercourse. This has not been invoked. On the contrary, the conduct of the United States was magnanimous.¹⁰⁶ The government may well have hesitated, in the interest of its own citizens, to lay an embargo upon trade. The serious questions of veracity between ship-masters and Canadian officials were of themselves enough to recommend caution.¹⁰⁷

During the last session of Congress two bills of a quasi-retaliatory nature were considered.¹⁰⁸ The one originating in the House might have prohibited not only all commercial relations with Canada, but even the entry of the rolling stock of Canadian railways. To this strict quarantine the Committee of the Senate objected, and proposed to directly

menace only that portion of American and Canadian trade that is carried on in Canadian vessels. The House having shown a disposition to insist upon its own bill, there was a possibility for a while that all action would be suspended. What is virtually the Senate bill was ultimately enacted. Compared with the measure of the previous year, it increases the absolutism of the President over the occupations and fortunes of persons engaged in trade between the United States and Canada. It assumes interpretation of treaty rights and the efficacy of "touch-and-trade" permits in giving a commercial character to a fishing vessel; claims for all such vessels the same treatment that is accorded to "the most favored nation," and makes it the duty of the President—at his discretion, and when he shall be satisfied of the infraction of any of the rights in question—to deny to the vessels of the British Dominions of North America, in whole or in part, any entrance into the waters or ports of the United States, except in cases of distress, and to prohibit the entry of fresh and salt fish or any other product of the said Dominions, or coming from them, into the territory of the United States.¹⁰⁹

The general objection to all such legislation is that Congress should take the responsibility of regulating trade, and not foist its constitutional duties upon the executive. Powers of this kind, though not to this degree, have been granted before. It is questionable whether they were ever successful in compassing the end proposed.

The particular objections to this measure arise from the circumstances of the case. One hundred years ago the Fishery was the principal industry of the North Atlantic seaboard; now it is an inconsiderable factor among the industries of New England, and an infinitesimal one in the business of the whole country. It would be fairer to say that in the maritime provinces of Canada alone the condition of the Fishery is the measure of prosperity.¹¹⁰ The capital invested in the New England Fisheries is estimated at \$19,937,607,¹¹¹ and the annual value of the catch at \$4,590,000. The Canadians, with a capital of \$6,697,459 obtain an annual product of \$17,722,973.¹¹² During the year 1886, out of a total import and export trade of \$69,449,462 between the United States and Canada, the total value of Canadian fish involved, includ-

ing fresh fish not liable to duty, was \$2,390,393, a ratio of $3\frac{1}{2}$ per cent.¹¹³ If the special mention in the Retaliation Act of a possible prohibition of Canadian fresh fish has more than a passing significance, the statistics will give an idea of the relative value of the traffic at which this extraordinary measure is directed. It has been recently pointed out that our importation of eggs from Canada exceeds our importation of dutiable fish by nearly \$800,000, and nearly equals our importation of all kinds of fish.¹¹⁴ Without endeavoring to estimate the derangement of general trade suggested by the act, and remembering that a Canadian authority has estimated the balance from 1872 to 1882 at \$153,827,937 in favor of the United States,¹¹⁵ it can be seen that the aggregate tonnage engaged between American and Canadian ports is not second to that employed in our trade with England.¹¹⁶ Canada may be permitted to wonder that reciprocity between the United States and Mexico is not believed to be impossible, when the whole volume of our trade with the southern hemisphere for three years past amounts to \$122,330,607 against \$121,321,378 with her alone.¹¹⁷ The Secretary of the Treas-

ury has informed the House that the government may lose in duties now paid by Canadian goods, \$4,476,900 per annum.¹¹⁸ Estimated on the basis of the annual New England catch, this is equivalent to a bounty of almost 100 per cent., and is nearly as much as was paid for all the privileges claimed during the twelve years of the treaty abrogated in 1885. Certainly, if the provisions of this act be applied to anything but the fish trade, it may be anticipated that much misrepresentation, loose statement, and manufactured excitement will wither in the flame of interested opposition. If used only to prohibit Canadian fish, the price will probably advance while the demand declines, as was the case last year.¹¹⁹ Yet the Fishery, though a small thing, is our own. It has a right to expect proper encouragement and support. Why should the discussion be limited to one class of expedients? It is not at all sure that the difficulty can be as well met by retaliation on Canada as by revision of our own tariff. How great a burden this imposes on all fishing ought to be calculated. Whether it fosters the industry may be doubted, when that small portion of it, represented by the "sardine" packing

houses of Eastport, capitalized at \$1,000,000, has paid in one year \$50,000 duty on tin plate.¹²⁰ Few people are fitted by habit or occupation to form a conception of the magnificent courage that mans the boats for "the Georges" or drops anchor among a fleet on the banks.¹²¹ It is the qualities required among the workers at this business, and not their gains, that single them out for admiration. The difference now existing between the wholesale and retail price of fish is from 100 to 200 per cent.¹²² This discrepancy is of no benefit to the catcher. If neither he nor the consumer are to be considered, but some one else, then not only is the sympathy of the public alienated by retaliation, but the endeavor to ascertain how an important article of food may become more abundant and less expensive will be quickened. What are our rights, guaranteed by an arrangement framed before the recognition of the mackerel fishery, and signed in 1818, the same year that the United States laid an embargo, at a time when our commercial relations with Great Britain have been characterized as "mediæval?" Where is the treaty to modify these hard conditions and, especially, where is the "most

favoured nation" clause? Are not the proclamations cited¹²³ in the nature of mutual concessions on both sides, and liable to be revoked whenever either party sees fit to adopt so mistaken a policy? If, as the Senate report says, the exclusion of Canadian vessels from the ports of the United States is not derogatory to treaty obligations, is a strict enforcement of the Convention of 1818 absolutely unjustifiable? Have we not refused to pay for some of these concessions on the ground of their uncertainty? Is the distinction drawn by Canada insupportable when our own law, placing Canadian fishermen and traders on the same footing, dates from June last?¹²⁴ What authority that both parties are bound to respect, has decided that Canadian port privileges are accessory to deep-sea fishing rights? The Dominion is not tractable, as the Imperial Government knows—very likely to its sorrow. In the midst of this trouble, Canada has undergone a general election, and the methods of its government for the protection of the fisheries have been sustained. The Provinces are playing a dangerous game. Should retaliation take its course

their sufferings would begin at once and would be out of proportion to ours.

If their wishes are considered by the United States it will be in spite of, rather than because of, some recent performances. This is perhaps the reason why, after all the reiteration of the fact that an adjustment belongs to representatives of the United States and the home governments, the Dominion is recognized and selected to bear the brunt of non-intercourse. The voices that have cried war, if they were serious, have not been taken seriously. Granted that the United States have the right to abrogate the Convention of 1818, the proposition that the Fishery of 1783 would thus revive, whatever force there may be in the theory, is practically as improbable as that England might abrogate the latter treaty and claim us as subjects of George III. An abrogation, in the light of experience, would place our fishermen where they were in 1817, worse off than they are to-day, for our negotiators at that time secured an extensive acknowledgment of our rights to the in-shore cod fishery. Another *ad interim* arrangement is understood to be contemplated. It can hardly be

useful unless it contains not only the promise but the potency of a new treaty or an International Commission.

The importance of fairness in attempting a solution becomes evident when it is remembered that the relations of the rival interests vary with every phase of development on the North-east Coast ; with every new method of catching fish ; with the fluctuations of markets and the possibilities of speculation. The fishermen are of the same race and have many characteristics in common. A proportion of them may be found under one flag or the other, as the conditions favor the United States or Canada. The unfriendliness of depriving a neighboring country of a natural market for its products, and the right of a nation to protect any or all of its industries, provoke passionate discussion of purely economic theories, wherein active politics often denies facts and forces the interpretation of treaties. The nature of the connection between England and her colony, with its party lines strongly defined on both sides of the Atlantic, is germane to the subject, as well as the necessity of reforming the present triangular relations between the United States,

Great Britain and the Dominion of Canada. The whole significance of laws affecting the commercial intercourse of the two nations is in doubt, and the assessment of damages for recent *ex parte* interference must be considered.

The solicitude in some quarters, lest no representatives on the part of the United States would be sufficiently competent or devoted to maintain the best interests of their country, is unworthy. It is not warranted by the history of our diplomacy, or generally believed. Its reiteration is a trifle suspicious. Even the Halifax award had its Alabama surplus.

Canada will not be expected to voluntarily submit to become an inland State by the secession of her maritime provinces. The idea of a peaceable annexation of all Canada might find its realization in the fullest reciprocity,—and reciprocity on the condition that Canada adopt our tariff against the rest of the world, is distinctly annexation. The Fishery Question, always annoying, becomes occasionally intolerable and forces an adjustment. It is to be hoped, in reason, that we are to have one this year. If possible, one

that may last longer than its predecessors. Both the Imperial and the Dominion governments must now understand that the fullest commercial privileges to our fishermen in Canadian ports, is the real point to be conceded. On the other hand, the large and true policy announced by the President,¹²⁵ and a growing disposition in the community to listen to both sides, are signs of the best augury. A new treaty, based on a comprehensive understanding of the situation in the United States and in Canada, need not necessarily be preceded by an International Commission. Should, however, an International Commission seem to afford the best opportunity for an adequate discussion of the whole subject, it would be an act of doubtful patriotism for either side, to insist on less efficient methods.

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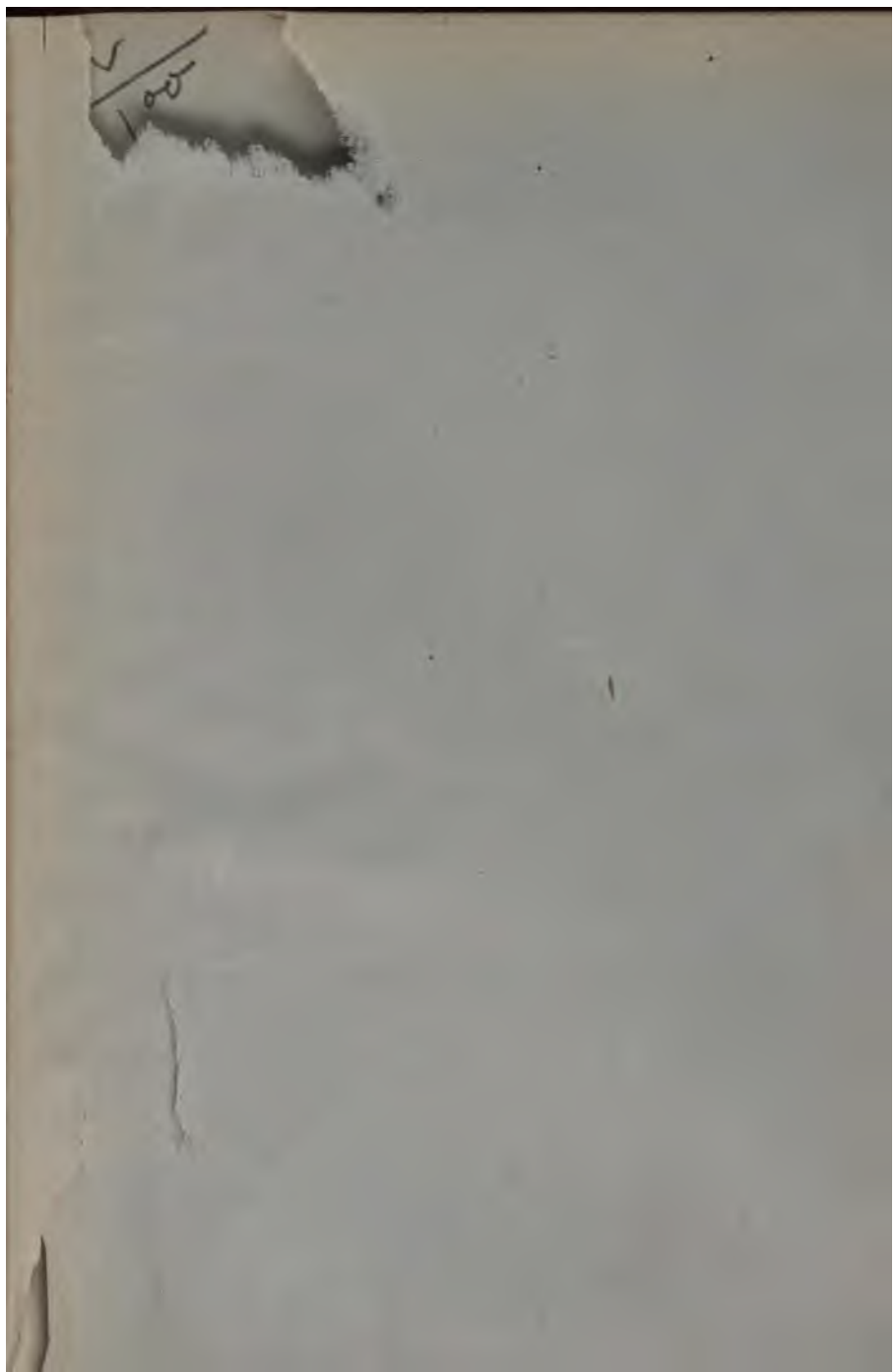
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